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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 431

FORD MOTOR COMPANY,
Complainant and Appellant,

v.

CHESTER R. PACE et al.,
Defendants and Appellees.

On Appeal from the Supreme Court of the State of Tennessee.

MOTION TO DISMISS THE APPEAL.

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MOTION TO DISMISS THE APPEAL.

The defendants move to dismiss the appeal from the State Court in this cause pursuant to Rule 16 of the Rules of this Honorable Court on the ground that the appeal does not present a substantial Federal question.

TIMELINESS OF MOTION.

The jurisdictional statement of the appellant is dated September 19, 1960, and was served on the appellees on September 20, 1960.

BASES OF MOTION.

Preamble.

The statute in question as found by the Legislature of Tennessee (Section 57-1701 of the Tennessee Code Annotated, Appendix E) and as found by the Supreme Court of the State of Tennessee (Opinion of the Supreme Court of Tennessee—Appendix A, p. 16a) and as evident from the proof in this case, was enacted under the police power of the State.

The necessity for similar laws under the police power of the states has been recognized by the States of Wisconsin, Colorado, Virginia Florida, Oklahoma, South Dakota and Michigan, where similar laws have been on the statute books of those states for many years.

The necessity for such laws under the police power of the states has been recognized by various courts in addition to the Supreme Court of Tennessee; for example, the Supreme Court of Nebraska in **Nelsen v. Tilley**, 1939, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729, said:

> "Motor vehicles, once luxuries, are now necessities. The handling of motor vehicles has become a complex business. The sale of new automobiles is closely tied in with the purchase, trade and sale of used cars. The possibilities of fraud upon the public have correspondingly increased. The elimination of harmful trade practices and dishonest dealings resulting in injury to the purchasing public may have been, and undoubtedly was, a factor in the passage of the act. Many courts have sustained similar legislative enactments."

The Court of Appeals of Ohio in **Ohio Motor Vehicle Dealers, etc., v. Memphis Auto Sales**, 103 Ohio App. 347, 142 N. E. 2d 268, 275, said:

"True the sale of motor vehicles is affected by public interest and laws regulating their sale generally are salutary.

. . . . . .

"Certainly the legislature has the power to determine that the conduct of an agency engaged in the sale of new motor vehicles is a business affected by the public interest. This fact has been recognized by legislatures and courts throughout the country."

Similar holdings in equally strong language are found in **Louisiana Motor Vehicle Commission v. The Wheeling Frenchman et al.**, 1958, 235 La. 332, 103 So. 2d 464, 469, and **Kuhl Motor Company v. Ford Motor Company**, 270 Wis. 488, 71 N. W. 2d 420; **Miller Motors v. Ford Motor Company**, 149 F. Supp., 1957, District Court, Middle District, North Carolina, 790, 794.

In the case of **E. L. Bowen Company, Inc., v. American Motor Sales Corporation**, 153 F. Supp. 42, 1957, District Court, Eastern District, Virginia, the District Court in discussing an act similar to the Tennessee act said:

"Nor can it be said that the statutes violate the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. In Williamson v. Lee Optical Co. of Oklahoma, 348 U. S. 483, 75 S. Ct. 461, 464, 99 L. Ed. 563, the Court said:

'The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought (citing authorities). We emphasize again what Chief Justice Waite said in Munn v. State of Illinois, 94 U. S. 113, 134, 24

L. Ed. 77, "For protection against abuses by legislatures the people must resort to the polls, not to the courts." ' ' '

Whether a substantial Federal question is presented must be considered, then, in light of the established proposition that the act in question was a valid exercise of the police power of the State of Tennessee.

I.

The Alleged Federal Question That the Provisions of the Statute Authorizing Revocation of a Manufacturer's License Are Not Valid on Their Face or as Applied to Appellant Under the Due Process Clause of the Fourteenth Amendment of the Federal Constitution Because of Either Bias and Prejudice Against the Manufacturer or Pecuniary Interest in the Issues, as Set Forth in Question I A (1) and (2) of the Averred "Federal Questions Presented", Is Not a Substantial Federal Question.

Section 59-1703 of the Tennessee Code Annotated specifically provides that the members of the Commission shall be of good moral character, and each shall have been actually engaged in the **manufacture**, distribution, or sale of motor vehicles (Appendix E, p. 30a). By the express terms of the act, manufacturers of motor vehicles such as the appellant are entitled to have representation on the Commission if requested; but no such request has been made.

An isolated sentence from the Opinion of the Supreme Court is cited to support the proposition that only dealers may serve on the Commission, but when such statement is read in its context in the opinion of the Supreme Court of Tennessee, it is apparent that such was not the Court's construction of the act, but rather a recitation of the

charge against the act made by appellant and contrary to this assertion is the express language of the statute in question.

The argument that because franchised automobile dealers serve on the Commission that the Commission is biased and prejudiced and that the members of the Commission have a pecuniary interest on the speculative supposition that they too might some day have a case before the Commission is spurious in light of every day experience. It follows the same process of reasoning as saying that no lawyer could serve on a Court hearing a disbarment case; that no doctor could serve on a grievance committee of the Medical Board considering a grievance presented by a patient of some doctor not a member of the Board; that no real estate agent could legally be a member of a real estate board considering the ethics of a deal between another real estate agent and his customer, etc. As pointed out by the Supreme Court of Tennessee in its opinion, all regulatory boards are made up of members of the profession which that board governs and the reason for the same is obvious. Adopting this same fallacious reasoning, it could be insisted with equal logical accuracy that the nonfranchised dealer members of the Commission would be biased in favor of appellant and against a franchised dealer in the hope of getting a franchise; or that both franchised and nonfranchised dealer Commissioners would have a pecuniary interest to favor the manufacturer and oppose dealers so as to alleviate competition. All such theoretical interests or prejudices are so speculative as to be ridiculous.

It is actual existence of bias or prejudice or pecuniary interest and not a mere apprehension of it which would render a commission or board or its members improper as such. That is, it must be such an interest as is direct, definite and capable of demonstration rather than one

remote, uncertain, contingent, unsubstantial or merely speculative or theoretical to be disqualifying.

42 Am. Jur., p. 312;
In re: Low, 124 N. Y. Supp. 1050, affirmed in 142 App. Div. 533, 127 N. Y. Supp. 26;
Annotation, 47 A. L. R. (N. S.) 153.

Accordingly, we submit that since appellant has failed to show any attempt to have a representative on the Commission and since no bias or prejudice, other than a remote, theoretical or speculative interest of the members of the Commission has been shown, the statute as applied to appellant evidences no deprivation of appellant's rights under the due process clause of the Fourteenth Amendment of the Federal Constitution; and since the act expressly authorizes and permits representation on the Commission from all branches of the field of automobile merchandising, to-wit, manufacturers, distributors and dealers on the Commission, certainly the act on its face does not deprive appellant of its rights under the due process clause of the Fourteenth Amendment of the Federal Constitution.

Furthermore, the act in question provides in Section 59-1717, Tennessee Code Annotated (Appendix, p. 44a) that the action of the Commission is subject to review in the Circuit Court of Davidson County as provided in Chapter 9 of Title 27 of the Tennessee Code Annotated, which provides in Section 27-911 that the hearing shall be on the proof introduced before the Commission "and upon such other evidence as either party may desire to introduce."*

* Upon such hearing the Court reviews the evidence and determines whether the Commission has acted beyond its jurisdiction or has acted arbitrarily, fraudulently or illegally.

Hoover Motor Express Company, Inc., v. Railroad and Public Utilities Commission, 1953, 195 Tenn. 593, 261 S. W. 2d 233.

Thus any action by the Commission is subject to review and if any actual bias or prejudice is shown or any actual pecuniary interest on the part of any member of the Commission or a Commissioner, such proceedings before the Commission would, obviously be set aside under such review. As has been pointed out by this Court, when an opportunity to be heard is given, the requirements of due process are satisfied, **especially when a right of review in the courts is given.**

Long Island Water Supply Company v. City of Brooklyn, 166 U. S. 685, 688.

II.

The Alleged Federal Question That the Provisions of the Statute Authorizing Revocation of a Manufacturer's License Are Not Valid on Their Face or as Applied to Appellant Under the Due Process Clause of the Fourteenth Amendment of the Federal Constitution Because of Vagueness or Uncertainty in the Statutory Language as Set Forth in Question I B of the Averred "Federal Questions Presented" Is Not a Substantial Federal Question.

As is stated by the text writer in 50 Am. Jur. at page 489:

> "A statute is not necessarily void merely because it is vague, indefinite, or uncertain, or contains terms not susceptible of exact meaning or is stated in general terms, or prescribes a general course of conduct, or does not prescribe precise boundaries or is imperfect in its details, . . . or because the intention of the legislature might have been expressed in plainer terms, and questions may arise as to its applicability, and opinions may differ in respect as to what falls

within its terms, or because the statute is difficult to execute."

Such was in effect the holding of this Court in **Hygrade Provision Company v. Carl Sherman**, 266 U. S. 497, 502.

The Supreme Court of Tennessee has defined for the Commission the rules by which it must be bound in applying the language of the act in stating as it did in the case of **Moto-Pep, Inc., v. McGoldrick**, 1957, 303 S. W. 2d 326, that words of a statute are to be taken in their natural and ordinary sense. As has been pointed out by several district courts, the meaning to be ascribed to words is to be ascertained and determined from the context so as to give affect to the legislative purpose and intent as expressed in the act (**Day v. North American Rayon Corporation**, 140 F. Supp. 490, and **U. S. v. Burleson**, 127 F. Supp. 400). And as this Court has declared, all laws should receive a sensible construction (**U. S. v. Howell**, 78 U. S. 432, and **U. S. v. Kirby**, 74 U. S. 482, 486).*

The terms complained of as being vague and uncertain when read as a part of the statute setting forth its purposes and intent are neither vague nor uncertain and when taken in their natural and ordinary meaning as ascertained and determined from the context so as to give effect to the purposes and intent of the legislature as expressed in the act have an all too definite meaning.

Hence, we submit that this alleged Federal question is not only not substantial but totally without merit.

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* Similar holding is to be found in: Bowen v. American Motors, 1957, 153 Fed. Supp. 42.

III.

The Alleged Federal Question That the Statute Involved Imposes an Undue Burden on Interstate Commerce as Set Forth in II (a) and (b) of the Averred "Federal Questions Presented" Is Not a Substantial Federal Question.

This Court has repeatedly held that statutes passed under the admitted police power of the State and necessarily affecting interstate commerce are not for that reason alone invalid.

Hennington v. Georgia, 163 U. S. 299;
Bradley v. Public Utilities Commission, 289 U. S. 92;
Carter v. Virginia, 321 U. S. 131.

The particular features of the act challenged as infringing upon commerce are the provisions set forth in Tennessee Code Annotated 59-1714, Sections (g) (1), (h) (1), (h) (4) and (h) (5). Each of these sections was found by the Supreme Court of Tennessee to be necessary in order to effectively exercise the police power of the State. All of Section (g) has to do with coercion or attempted coercion. Coercion has always been abhorred in the law of contracts and has been repeatedly recognized by this and other courts as the basis of invalidation of the same. Certainly then the prevention of coercion in sales contracts cannot be construed an "undue" burden on interstate commerce.

Section (h) (1) can be easily avoided by the manufacturer not misleading the public by "publicly advertising for immediate delivery" its manufactured product unless such be the truth, i. e., unless they are available for immediate delivery. The prevention of the publication of untruths is certainly within the police power of the State

and does not constitute an "undue" burden on interstate commerce.

In like manner (h) (4) seeks to prevent the publication of half truths by manufacturers, i. e., the making of express warranties to be serviced by their dealers and then holding out to the public as their dealers persons who do not have the facilities to satisfy the warranties. Again, we submit that this prevention of the publication of an untrue, false and fraudulent statement is well within the police power of the State and does not constitute an "undue" burden on the floor of interstate commerce.

Section (h) (6) has to do with unfair dealings by the manufacturers and dealers. The effect of such upon the public safety of the state is well defined in the act itself, the testimony in this case and the opinions of the Tennessee court and other courts in ruling on similar laws. The prevention of unfair dealings has been recognized by all of the courts as the basis for the exercise of the police power of the State and even though commerce might be affected thereby such is not an "undue" burden, but rather is a justified regulation touching commerce.

That the operation of motor vehicles on the highways of the states has become a matter of the greatest concern insofar as the safety and health of its citizens are involved stands beyond question. As one of the means of protecting the health and safety of its citizens, the legislatures have found it necessary to provide certain rules of conduct as respects the dealings of manufacturers, distributors and dealers of such vehicles, both with the public and among themselves. Such we submit falls squarely within the rule laid down by this Court in the case of **Crutcher v. Kentucky**, 141 U. S. 649, when the Court said:

> "It is also within the undoubted province of the State Legislature to make regulations with regard to

> the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

These regulations therefore which the legislature and the courts of Tennessee, as well as those in other states, have found to be essential constitute no undue burden on interstate commerce, and the allegation that they do is not sufficient to bring about a substantial Federal question.

The statute complained of constitutes no prohibition against appellant doing business in Tennessee; it only requires that appellant comply with the local regulations, which are equally applicable to both interstate and intrastate business; such regulations being necessary because of the great disparity in the economic power of large corporations such as appellant here and small businessmen such as the appellee, Cocke County Motor Company. This being true, the reasoning of this Court in **Panhandle Eastern Pipe Line Company v. Michigan Public Service Commission**, 341 U. S. 329, is most apt.

IV.

The Alleged Federal Question That the Statute in Question Violates the Contract Clause and Is Confiscatory in Violation of the Due Process Clause as Set Forth in III of the Averred "Federal Questions Presented" Is Likewise Not a Substantial Federal Question.

This Court in the case of **Manigault v. Springs**, 199 U. S. 473, and other cases there cited, determined this question in clear, concise and apt language as follows:

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts may not estop the legislature from enacting laws intended for the public good.
>
> "While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with."

CONCLUSION.

Appellees respectfully submit that the alleged Federal questions are not substantial Federal questions for the reasons heretofore set out and in fact in most instances are no longer questions under the applicable law as declared by this Court, and accordingly this appeal should be dismissed pursuant to Rule 16 of this Honorable Court.

Dated this the 10th day of October, 1960.

Respectfully submitted,

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